UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SHAMROCK FOODS COMPANY

and **Case 28-CA-150157**

BAKERY, CONFECTIONERY, TOBACCO WORKERS' AND GRAIN MILLERS INTERNATIONAL UNION, LOCAL UNION NO. 232, AFL-CIO-CLC

GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

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I. Introduction

The decision and recommended order issued by Administrative Law Judge Jeffrey D. Wedekind (the ALJ) in this matter is overwhelmingly supported by the entire administrative record, including the incredulous testimony elicited from supervisors and agents of Shamrock Foods Company (Respondent). Among many other violations, the ALJ found that Respondent violated Section 8(a)(1) and (3) of the Act by discharging a vocal union sympathizer while organizing efforts by the Bakery, Confectionery, Tobacco Workers' and Grain Millers International Union, Local Union No. 232, AFL-CIO-CLC (the Union) were well underway. Respondent contests nearly 200 aspects of the ALJ's decision by stretching the record and characterizing its own misconduct as innocuous. However, Respondent's misdeeds run deep and Counsel for the General Counsel (CGC) urges the Board to affirm the ALJ's decision while granting CGC's limited cross-exceptions.

II. The ALJ Properly Granted Sanctions

Respondent excepts to several of the ALJ's findings on the basis that sanctions were improperly imposed at the hearing. Specifically, Respondent argues that sanctions imposed related to allegations of supervisory status and an unlawful wage increase during an organizing campaign, were overbroad and unwarranted. Further, Respondent essentially excepts to CGC's use of and reliance on the sanctions granted by the ALJ. However, as discussed below, the sanctions were appropriate in light of Respondent's failure to comply with a subpoena *duces tecum* (subpoena) issued at the request of CGC and were legitimately relied on by CGC when necessary.

A. Background on Imposition of Sanctions

CGC issued the subpoena and served it on Respondent two weeks before the hearing. Respondent filed a Petition to Revoke the subpoena on September 1, 2015.[1] GC Exh. 2(e). After CGC filed an Opposition to Respondent's Petition to Revoke, the ALJ issued an Order, granting, in part, Respondent's petition. GC Exh. 2(a), 2(f). The parties agreed to produce and receive the documents ordered for production electronically at the outset of the hearing. Before having the opportunity to review the documents due to technical issues on the first day, Respondent represented to the ALJ that it had substantially complied with the subpoena. Tr. 45:4-14 (stating that "I would say with 95 percent certainty anything else that comes out now would be an email and that would be it").

Respondent's representation was far from the truth. The following day, after CGC reviewed all the documents, the parties spent a couple hours discussing Respondent's noncompliance with the ALJ. CGC went over nearly every item in the subpoena, noting some obvious production failures including job descriptions, payroll records, and personnel files related to the contested supervisory status. When the ALJ asked Respondent's counsel why these documents were not produced, he responded by offering to produce them, but also requesting for the first time, a confidentiality order. The ALJ admonished Respondent's counsel by observing that Respondent had not done "the basic" and decided to grant sanctions. Tr. 60:9-67:18.

However, this was just the beginning. The parties continued to go through each subpoena request noting deficiencies in the production. On more than one occasion, seemingly caught red-handed, Respondent's counsel's response was simply that they would look into it or that "it's a rolling production." Tr. 69, 74:25-80:22. When it came to documents related to employee

[1] Hereinafter, all dates are in 2015 unless otherwise noted.

Thomas Wallace's discharge, CGC noted that *not one* document was produced related his discharge. Respondent's counsel countered by representing that Respondent looked into it, but that such documents did not exist. Tr. 84:17-85:22. This unlikely representation turned out to be false. ALJD 40 n. 72 ("[S]ubsequent testimony established that the Company does regularly prepare termination reports; that there was a termination report for Wallace; and that it was circulated by email."); Tr. 403:14-413:7.

About halfway through the discussion regarding Respondent's production failure, CGC pointed out that Respondent failed to produce a letter drafted by its President and CEO that is squarely at issue in the case. Tr. 92:15-96:5. Respondent admitted that it had possession of the letter, but stated that it did not produce the document because they had to "prioritize" production and that CGC already had a copy of the letter. Tr. 92:15-96:5. At this point, the ALJ, clearly astonished by Respondent's lack of candor and efforts to comply with the subpoena, stated:

> Here's the deal. That was a simple one, like number one was a simple one, and you didn't produce it. And you said you were prioritizing, and then you say you didn't turn it over, because you think they already have it. You know, that's not always the issue. Sometimes if they get a letter from you pursuant to a subpoena that establishes authentication, identification, the various things are subpoenaed. That kind of thing doesn't reflect well on your good faith overall.

Tr. 93:6-10. Immediately following, CGC notified the ALJ that Respondent had not produced any payroll records related to the allegation that it granted an unlawful wage increase. Tr. 94:3-8. When asked why it had not produced any documents, Respondent's counsel had no explanation other than it was willing to enter into stipulations because there was not a dispute regarding the amount and date of the pay raise, notwithstanding that Respondent's Answer denied that it granted the increase and Respondent had not previously offered to enter into such a stipulation. Tr. 94:9-16. Again, the ALJ admonished Respondent's disregard for its obligation to

produce the subpoenaed documents or otherwise communicate with CGC about its production. Tr. 95:6-97:19.

Finally, after reviewing the entirety of the subpoena, the ALJ summarized as follows, "I mean the bottom is we've gone through now the entire subpoena, numerous, numerous, numerous paragraphs where the Company has acknowledged that they – you didn't look for certain things or didn't disclose them, didn't think it was necessary, et cetera, et cetera." Tr. 104:6-10. The CGC subsequently requested several sanctions in light Respondent's obvious and virulent disregard of the subpoena. Tr. 108:23-110:2. Specifically, CGC requested that on the issue of supervisory status, the CGC be permitted to provide secondary evidence, that Respondent be prohibited from cross-examining witnesses related to testimony on this issue, and that Respondent be prohibited from introducing direct evidence. Tr. 109:1-6. Regarding the other documents not produced, CGC requested that Respondent be prohibited from introducing any documents that were responsive to the subpoena. Tr. 109:7-13. CGC also requested adverse inference that may relate to Respondent's lack of production. Tr. 109:13-15.

Thereafter, the ALJ heard argument from all sides regarding the imposition of the sanctions requested. In sum, Respondent argued that it had produced 3,500 documents and that the remaining documents were to come on a "rolling basis." Tr. 113:12-114:16. In response, CGC pointed out that a significant portion of the documents produced were unresponsive and that at no point did Respondent communicate that the production would be on a "rolling basis." Tr. 115:19-118:21. CGC further pointed out that Respondent's counsel had actually represented to the contrary – that Respondent had complied with the subpoena and there may only be a few documents missing. Tr. 118:4-21. The ALJ agreed with CGC, pointing out that, "I was clearly

left with the impression that you just had a few items that you were still looking for, nothing like this that we went through today." Tr. 118:22-25.

In granting the sanctions requested by CGC, the ALJ relied on *McAllister Towing*, 341 NLRB 394 (2004), enfd. 156 Fed. Appx. 386 (2d Cir. 2005). Tr. 121:3-13. The ALJ discussed how Respondent's counsel made clear representations that it had substantially complied with the subpoena, but left it up to CGC to discover that it had not. Tr. 121:19-123:9. The ALJ discussed how he would not have granted the sanctions had Respondent simply communicated that it was at least making an effort to comply. Tr. 121:19-123:9. The ALJ also discussed other conduct that reflected poorly on the Company, such as waiting until first day of the hearing to stipulate that the President and CEO of the company was actually a supervisor or agent under the Act. Tr. 121:24-122:12. Finally, the ALJ discussed how Respondent admitted to finding hundreds of potentially responsive e-mails, but failed to turn any of them over. Tr. 122:13-18. In regard to the lack of communication, the ALJ stated, "You didn't communicate to me or to the General Counsel what was actually going on. I haven't seen anything like it, never seen anything like it." Tr. 123:5-7.

On the seventh day of hearing, while Respondent was presenting evidence related to the unlawful wage increase, the ALJ granted additional sanctions based on Respondent's lack of production. Tr. 909:1-924:24. Specifically, the ALJ granted sanctions in that Respondent was prohibited from introducing direct evidence on this issue. *Id.* The ALJ granted this additional sanction after CGC objected to Warehouse Manager Ivan Vaivao's testimony, and requested additional sanctions. *Id.* After reviewing the related subpoena requests and Respondents lack of production, the ALJ reasoned that sanctions were appropriate because (1) Respondent was not prejudiced in the way it had prepared its case as compared to when the original sanctions were

granted, (2) the ALJ was convinced that Respondent generally and specifically failed to comply with the subpoena or make a good-faith effort to do so, and (3) without the subpoenaed documents, the CGC would be wholly unable to cross-examine the witnesses on this issue. *Id.*

B. The ALJ's Imposition of Sanctions was Appropriate

The Board should affirm the ALJ's grant of sanctions because the ALJ did not abuse his discretion. The Board is permitted "to impose a variety of sanctions to deal with subpoena noncompliance, including permitting the party seeking production to use secondary evidence, precluding the noncomplying party from rebutting that evidence or cross-examining witnesses about it, and drawing adverse inferences against the noncomplying party." *McAllister Towing*, 341 NLRB at 396 (citing *International Metal Co.*, 286 NLRB 1106, 1112 n.11 (1986)). *See also Bannon Mills*, 146 NLRB 611, 613 n.4, 633-34 (1964). Such authority "flows from [the Board's] inherent interest in maintaining the integrity of the hearing process." *McAllister Towing* 341 NLRB at 396 (internal quotations omitted). At first instance, the authority to impose sanctions is exercised at an ALJ's discretion and is reviewed by the Board under the "abuse of discretion" standard. *Id*.

In determining whether an ALJ has abused his discretion, the Board will consider "whether the record establishes, with sufficient clarity," that the noncomplying party failed to substantially comply with a valid subpoena and the reasons for such noncompliance. *Id*. at 397. *See also Essex Valley Visiting Nurses Assoc.*, 352 NLRB 427, 427 n.3 (2008). Here, just like in *McAllister Towing*, the ALJ gave Respondent countless opportunities to be heard before imposing the sanctions. Id. at 397. Here, just like in *McAllister Towing*, Respondent had no good explanation for noncompliance. Id. at 398. Unlike in *McAllister Towing*, the ALJ in this case had actually already ruled on Respondent's Petition to Revoke the subpoena, so there was

no question as to what documents were required at the day of hearing. *See supra*. Further, unlike in *McAllister Towing*, Respondent falsely represented to CGC and the ALJ that it had substantially complied with the subpoena even though it had not. These last two factors make it even more evident that the ALJ did not abuse his discretion in finding that Respondent's bad faith and substantial noncompliance warranted the imposition of sanctions on a limited number of issues. The Board should accordingly find so, and reject Respondent's exceptions on this issue.

C. The ALJ's Appropriately Relied on an Adverse Inference in Finding Floor Captains are Supervisors.

The ALJ found that Arthur Manning (and Zack White) is a supervisor under Section 2(11) of the Act. Respondent excepts to this finding on three grounds: (1) the ALJ erroneously granted sanctions that hampered its ability to introduce evidence, (2) the ALJ erred in granting CGC's request for an adverse inference related to Manning's duties and responsibilities, and (3) the ALJ should have found an adverse inference against CGC for not questioning Manning regarding his supervisory status. R Br. at p. 18-19 & n. 9, 10.

First, as discussed above, the ALJ properly awarded sanctions based on Respondent's lack of subpoena production. Accordingly, the Board should not disturb the ALJ's grant of sanctions.

Second, the ALJ appropriately granted CGC's request for an adverse inference which appropriately supported the ALJ's finding. ALJD 17 n. 29. CGC requested an adverse inference based on Respondent's failure to produce a job description or other related items regarding Floor Captains' duties and functions, even though Respondent's counsel admitted that such documents were "out there" (Tr. 65:3-8). ALJD 17, n. 29. As with the imposition of other sanctions, Respondent's exception to the ALJ's drawing of an adverse inference against it should be

considered under an "abuse of discretion" standard. *See Chipotle Services, LLC*, 363 NLRB No. 37, slip op. at n.1 (2015) (finding that the ALJ did not abuse her discretion in drawing an adverse inference). Here, the ALJ did not abuse his discretion in granting and applying an adverse inference in support of Manning's supervisory status. After summarizing his conclusion that Respondent "failed to make a good-faith effort to timely comply with the subpoena requests as required," the ALJ found that, "the Company's contumacious failure to produce the subpoenaed documents supports an adverse inference that they would have corroborated the testimony of [the employee witnesses]." ALJD 17-18 n.29. The ALJ's decision to grant the adverse inference and his finding of supervisory status are well supported by the record. *See, e.g., RCC Fabricators, Inc.*, 352 NLRB 701, 701 n.5 (2008) (approving the ALJ's reliance on adverse inference to support finding of supervisory status because the employer failed to produce a job description known to exist). Accordingly, the Board should affirm the ALJ's grant of an adverse inference and adopt the ALJ's finding that Manning is a Section 2(11) supervisor.

Finally, the Board should reject Respondent's argument that the ALJ should have granted its request for an adverse inference. Respondent excepts to the ALJ's finding that an adverse inference against the CGC would be inappropriate because there is "no record basis to assume that White and Manning would have testified favorably to the General Counsel." ALJD 17-18 n.29. Respondent argues that because Manning (and White) testified at the hearing under CGC's subpoena, but CGC failed to question them on the issue of supervisory status, an inference should be drawn that they would have testified unfavorably. In support, Respondent cites *Desert Pines Golf Club*, 334 NLRB 265, 268 (2001). However, just as the ALJ found, *Desert Pines Golf Club* "has no precedential weight as the Board expressly disavowed the judge's discussion of the issue." ALJD 17-18 n.29. Moreover, Respondent's proposition is clearly contrary to

Board precedent. *See International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. mem. 861 F.2d 720 (6th Cir.1988) (an adverse inference against a party for failing to call a witness is inappropriate unless it may reasonably be assumed that the witness would have testified favorably to that party)

In short, Respondent's exceptions related to the ALJ's finding that Manning and White are Section 2(11) supervisors amount to no more than a baseless attempt to reverse the ALJ's grant of sanctions and to turn the tables on CGC. Accordingly, the Board should adopt the ALJ's finding that Manning and White are statutory supervisors.

III. Respondent's Exceptions to Finding of Unlawful Conduct Should be Rejected

A. The Board Should Affirm The ALJ's Findings Related to Unlawful Bargaining Statements

Respondent excepts to the ALJ's finding that its Vice President of Operations, Mark Engdahl (Engdahl), made coercive statements to employees by implying that they would lose benefits if they chose the Union as their bargaining representative and by explicitly telling them that the Union would hurt everyone in the future. However, the ALJ properly relied on the context of Engdahl's statements in finding these violations.

1. Engdahl's "Clean Slate" Statement Violated the Act

Respondent argues that the ALJ erroneously found Engdahl's statement to a majority of warehouse employees that "the slate is wiped clean . . . once bargaining begins" unlawful because Engdahl and other managers simply described the "give and take of collective bargaining." (R Br. at 23). As Respondent aptly points out, such statements are not per se unlawful. However, an employer statement that collective bargaining "begins from scratch" or "ground zero" violate Section 8(a)(1) of the Act, unless, in context, the employer "makes it clear

that any reduction in wages or benefits will occur only as a result of the normal give and take of negotiations." *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 800 (1980), *enfd. mem.*, 679 F.2d 900 (9th Cir. 1982). *See also BP Amoco*, 351 NLRB 614, 617 (2007).

Accordingly, the ALJ did not make his finding based solely on Engdahl's statement in isolation. ALJD 5:14-23. Rather, the ALJ scrutinized Engdahl's comments throughout his nearly hour long presentation to employees,[2] including how Engdahl began the presentation, Endgahl's discussion on both ends of the "clean slate" statement, related comments he made near the end of his presentation, and notable omissions throughout the entire presentation. *Id.* In doing so, the ALJ pointed out that, rather than explaining the give and take of bargaining, Engdahl merely gave examples of Respondent's competitors and how they apparently used collective bargaining as a means to reduce wages. *Id.* Based on this analysis of the context of Engdahl's "clean slate" statement, the ALJ found that Engdahl "clearly suggested or implied that Shamrock would do the same thing [as its competitors]." *Id.*

Notably, Respondent offers no other contextual clues from the swath of Engdahl's presentation that suggests a different outcome is appropriate. Respondent points out that Engdahl told employees to conduct "[their] own research," to "make [their] own judgments," and that "there's no guarantees . . . that you're going to come out with anything better than you got." R Br. at 23. Apparently, by telling the employees to essentially *figure it out on their own*, Respondent contends that Engdahl "discuss[ed] the reality of negotiating and bargaining" to a degree that dispelled Engdahl's threat. *Id.* However, Respondent's attempt to "wipe clean" Engdahl's threatening implication is lackluster at best. *Id.* The Board should adopt the ALJ's finding.

[2] The ALJ relied on and cited large sections of GC Exh. 8(a) and (b), which were an audio recording of the meeting and a certified transcript thereof in considering this allegation.

2. Engdahl's "Anything, Nothing, Forever" Statement Violated the Act

Respondent takes exception to the ALJ's finding that Engdahl similarly violated the Act during a meeting on April 29. The ALJ found that Engdahl's statement during that meeting that "The company doesn't have to agree to anything, nothing . . . Bargaining can go on forever. It can never end . . . All you have to do is bargain in good faith," was coercive and unlawful after considering both the content and the context of the statement. ALJD 15:4-24. Specifically, the ALJ considered how Engdahl made similar threatening statements in the January 28 meeting (discussed above) and during this same meeting on April 29 (discussed below). *Id.* Based on that backdrop, the ALJ concluded that Engdahl's statement about the bargaining process would likely be construed by employees as a threat that the company would engage in regressive bargaining or otherwise delay the bargaining process if they selected the Union. ALJD 15:17-24.

In excepting to this finding, Respondent argues that Engdahl's statements "fall within Section 8(c)'s protections." R Br. at 25. However, just like Engdahl's statements on January 28, the ALJ properly found these statements unlawful. In addition to the context specifically pointed out by the ALJ, the Board should also consider that Engdahl's statement came right after he reminded employees that it is "the company [that] pays wages, benefits, sets work conditions – not the union." GC Exh. 12(a), (b). Engdahl's friendly reminder illustrates the Supreme Court's reasoning in finding threatening statements unlawful in *NLRB v. Gissel Packing Co*., 395 U.S. 575, 617 (1969). The *Gissel* Court warned that when weighing the rights of employer speech against "the equal rights of employees to freely associate," such balancing "must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *Id*. Here, by reminding

employees of their economic dependence on Respondent and then telling them that all the Union could do is ask for things without Respondent agreeing to any of it, Respondent further planted its seed of fear in employees that they would lose their benefits if they chose the Union. Moreover, Respondent, as discussed above, completely failed to dispel the threat. Accordingly, the Board should adopt the ALJ's finding that Engdahl's statement violation Section 8(a)(1) of the Act.

3. Engdahl's "Hurt Everybody in the Future" Statement Violated the Act

Respondent also excepts to the ALJ's finding that Engdahl's statement at the April 29 meeting that the Union "will hurt Shamrock. It will hurt all of you. It will hurt everybody in the future," violated the Act. R Br. at 27. Respondent argues that Engdahl lawfully expressed his opinion and that the ALJ relied on a distinguishable case. R Br. at 26. Specifically, Respondent argues that in *Reno Hilton Resorts Corp.*, 319 NLRB 1154 (1995), a similar statement was found to be lawful only because it was made in the context of plant closure threats. However, the ALJ properly relied on *Reno Hilton*. In discussing this allegation, the ALJ noted that, "As for general assertions of harm resulting from union organizing, while not unlawful by themselves, such assertions may become unlawful 'if uttered in a context of other unfair labor practices that impart a coercive overtone to the statements.'" ALJD 14:17-20, citing *Reno Hilton*, 319 NLRB at 1155. The ALJ also pointed out that Endgahl's statement that the Union "will hurt" them was made "in the context of numerous other unfair labor practices." ALJD 14:28-30. Specifically, the ALJ recognized that Wallace was discharged just weeks earlier. *Id.* Discharging an open union sympathizer is a "hallmark" violation just as the Board has found threats of plant closure. *Id.* Thus, the context in which Engdahl made his statement is far more similar to that in *Reno Hilton*,

contrary to Respondent's contention. Accordingly, the Board should reject Respondent's attempt to distinguish the precedent relied on by the ALJ and adopt the ALJ's finding.

B. The Board Should Affirm the ALJ's Findings of Unlawful Interrogation

1. Supervisor Jake Myers Unlawfully Interrogated Employees

Respondent argues that the ALJ erred in finding that supervisor Jake Myers (Myers) unlawfully interrogated employee Thomas Wallace (Wallace) on January 28 because (1) the ALJ's credence of Wallace's testimony is not entitled to deference, and (2) the ALJ mischaracterized Wallace's response to Myers. However, each of Respondent's bases for exception lacks support.

First, the ALJ was on solid ground by crediting Wallace's testimony about his conversation with Myers because Respondent did not put forth any evidence (testimony or otherwise) that contradicted Wallace's detailed version of events. Just as Respondent points out, Myers testified that he did not recall whether he even spoke to Wallace. RB at 27. See also Tr. 863-64, 867. There is no basis to overrule a credibility determination that is premised on uncontroverted testimony. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951).

Finally, Respondent argues that the ALJ's reliance on Wallace's "noncommittal response" was in error because Wallace was in fact noncommittal about the Union at that time. However, Respondent wholly fails to address the other factors the ALJ relied on in finding an unlawful interrogation. Specifically, the ALJ found that "Myers was Wallace's *immediate supervisor*, he *purposefully* approached Wallace at his work station and questioned him *directly* about his personal views of the union, and he did so shortly *after a formal meeting* with all the warehouse employees where a *high-level corporate official* expressed opposition to the union

and *unlawfully threatened employees* with reduced benefits if they supported it." ALJD 20:18-22 (emphasis added). Moreover, although Respondent paints Wallace as being entirely noncommittal about the Union at that time, Wallace signed a union authorization card later that evening. ALJD 36:14-15; Tr. 651-652. Thus, his level of commitment and the truthfulness of his answer should be viewed relative to his actions on that same day.

2. Manager Joe Remblance Unlawfully Interrogated Employees

Respondent's exception regarding the ALJ's finding that Safety Manager Joe Remblance's (Remblance) questioning of Steve Phipps (Phipps) constituted an unlawful interrogation is similarly unsupported. Respondent would have the Board overturn the ALJ's finding simply based on Respondent's characterization of this interaction as "innocuous." R Br. at 29. However, the ALJ properly found, based on record evidence, that Remblance's questioning of Phipps was coercive and Respondent wholly failed to address the factors relied on by the ALJ. For example, Respondent's attempt to rewrite history fails to acknowledge the most important factor – the timing. As noted by the ALJ, "considering the timing – just 2 days after Phipps' announcement, and a few hours after the antiunion communication meeting where Operations VP Engdahl made several unlawful statement to Phipps and other first-shift senior employees – and the unlawful context described above, it is likely that Remblance's questions would have reasonably tended to shill employees in the exercise of their union activity." ALJD 23:27-32. Respectfully, the Board should adopt the ALJ's finding.

3. Supervisor Karen Garzon Confiscated Union Flyers and Interrogated Employees

Respondent argues that the ALJ erred in finding that Sanitation Supervisor Karen Garzon unlawfully interrogated employees based on a lack of evidence. R Br. at 29. In doing so, Respondent relies on sections of Garzon's testimony that was explicitly discredited by the ALJ.

Specifically, Respondent points out that Garzon took the flyers from the employees because they asked her to translate it. *Id.* However, Respondent offers no justification for overturning the ALJ's credibility determination aside from stating that Garzon's testimony went unrebutted. However, the ALJ discussed the whole of Garzon's testimony, drawing attention to inconsistencies and common sense inferences from Garzon's admitted conduct. ALJD 32 n.57. Thus, under *Standard Dry Wall Products*, the Board should not disturb the ALJ's finding or give credence to Respondent's position that the ALJ erred in finding that Garzon unlawfully questioned employees about their union sympathies.

C. The Board Should Affirm the ALJ's Findings that Respondent Unlawfully Solicited Employee Grievances

Respondent argues that the ALJ erred in two respects regarding his finding that it unlawfully solicited grievances from employees during meetings held on January 28 and February 5. R Br. at 30. First, Respondent contends that the ALJ merely presumed that Respondent knew about the Union campaign when these meetings were held. *Id.* However, the ALJ carefully considered the record and concluded that "there is strong circumstantial evidence that the Company at least suspected [the campaign] was going on." ALJD 7:31-33. This evidence included, among other things, an admission from a high level company official that an unrelated campaign had already failed, which undermined any other legitimate reason Respondent held a company-wide antiunion meeting at the Phoenix warehouse. ALJDALJD 7:33-36. See also ALJD 3:39-42; GC Exh. 8(a) and (b). Thus, the ALJ's finding that Respondent knew of the ongoing organizing efforts should be adopted by the Board.

Second, Respondent, relying on *Walmart Inc.*, 339 NLRB 1187, 1187 (2003), argues that its solicitations were not unlawful because its methods were not a significant departure from its past practices. R Br. at 31. However, the ALJ's finding to the contrary is clearly supported by the

record. Although Respondent states that there is "no evidence that Shamrock actually reduced the size of the meetings" (R Br. at 31 n. 14), admissions by its own management show otherwise. See GC Exh. 15(a) at 6:23-7:18 (Wright explaining how previous roundtable meetings were held with larger employee groups of about 250). Furthermore, the ALJ relied on this evidence when he stated that, "as indicated by Wright's own comments, the January 28 roundtable meeting was both intended and presented as the first in a series of more frequent, smaller meetings with employees to solicit their feedback." ALJD 7:43-8:1. Thus, the ALJ relied on credited record evidence in finding that Respondent had, in fact, significantly departed from its past practice of soliciting grievances and the Board should adopt his findings.

D. The Board Should Affirm the ALJ's Finding that Respondent Unlawfully Granted Employees Benefits During an Organizing Campaign

1. The Legal Standard

Promising and granting increased benefits after a union campaign commences squarely violates Section 8(a)(1) of the Act. As the Supreme Court has observed, "The danger inherent in well timed increases in benefits is the suggestion of a fist inside a velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged." *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). However, the Board has held that the grant of benefits during an organizing drive is not per se unlawful. Rather, "the Board will draw an inference of improper motivation and interference with employee free choice where the evidence shows that employees would reasonably view the grant of benefit as an attempt to interfere with or coerce them in their choice of representative." *Jewish Home for the Elderly of Fairfield County*, 343 NLRB 1069, 1087-89 (2004), enfd., 174 Fed. Appx. 631 (2d Cir. 2006).

2. Engdahl Unlawfully Granted Employees Benefits by Providing a Written Guarantee Regarding Layoffs

Respondent excepts to the ALJ's recommendation that its written commitment to employees not to lay them off was an unlawful promise or grant of a substantial benefit. R Br. at 32. In doing so, Respondent stretches Engdahl's testimony to its limits in a last ditch effort to support a finding otherwise. For example, in trying to show that the company had seemingly decided to avoid layoffs before the onset of the union campaign, Respondent points out that Engdahl told employees that Respondent would avoid such action "*if at all possible*." R Br. at 32 (emphasis added). Clearly, telling employees that the company would try to avoid a layoff is far from providing a written guarantee that it would not happen. As the ALJ notes, "Engdahl acknowledged at the hearing that the Company had never made such a written commitment in the past." ALJD 14:14-15. Moreover, it is no coincidence that this announcement came just two days after the lead organizer and veteran employee announced his involvement in the campaign. Again, the ALJ relied on this and other credible evidence in drawing an inference of improper motivation. Thus, the Board should adopt the ALJ's well supported finding.

3. Respondent Unlawfully Granted Employees a Wage Increase During an Organizing Campaign

Respondent argues that the ALJ improperly found that the substantial wage increase it granted to warehouse employees in May was unlawfully motivated because it claims that (1) there is no evidence that the company knew such employees were the target of the Union's organizing efforts and (2) the Union campaign was "dormant" at the time.[3] R Br. at 33-34. Not only does this position fly in the face of record evidence, but it completely ignores the ALJ's discussion on these issues.

[3] Respondent also argues that the ALJ's ruling was a result of the "overbroad" sanctions imposed. The sanctions are addressed above, in Section II.

First, Respondent argues that the company had no knowledge of whether certain warehouse positions were targeted by the Union's campaign as evidenced by the lack of election petition filed. However, the ALJ specifically addressed that, even though there had been no election petition filed, "there is no dispute here that the Company knew about union organizing campaign among the warehouse workers. . . . Nor is there any evidence or contention that the Company had reason to believe that the campaign excluded warehouse workers [in certain] positions." ALJD 35:7-11. Respondent contends that the ALJ "misunderstood" their argument regarding the significance that no election petition had been filed. However, the ALJ appropriately found that the lack of a petition is not evidence that Respondent had reason to believe that certain warehouse workers were excluded from the Union's efforts. Moreover, record evidence shows that the employees who received the wage increases were known by Respondent as targets of the campaign. For example, Sanitation Supervisor Garzon (discussed above) confiscated Union flyers from two sanitation employees just a few weeks later. See Section III.B.3.

Second, Respondent argues that Phipps' affidavit testimony that states the Union campaign was "dormant" at that time, shows that Respondent cannot be held account for its actions. R Br. at 34. However, just as the ALJ points out, (1) Respondent misconstrued Phipps' testimony and (2) Respondent's knowledge cannot be disproven by a statement that was not revealed to it until many months later. ALJD 35:21-35. Moreover, Respondent's argument is simply absurd given the company's relentless unlawful reaction to the Union campaign that continued through at least June, while employees continued to pass out flyers and make public announcements about their involvement in the campaign. Thus, the Board should wholly reject Respondent's desperate attempt to justify its conduct.

E. The Board Should Affirm the ALJ's Findings that Respondent Unlawfully Surveilled or Created the Impression that Employees' Union Activity was Being Monitored

1. Respondent Surveilled an Off-Site Union Meeting

Respondent excepts to the ALJ's finding that Art Manning engaged in unlawful surveillance when he showed up uninvited to an offsite Union meeting at Denny's on January 28. Respondent's only basis for doing so is its reliance on Manning's testimony that he was invited to the meeting. However, the ALJ expressly discredited that testimony. ALJD 21 n.37. The Board will not overrule an ALJ's credibility resolution unless the clear preponderance of the relevant evidence shows that the ALJ's credibility resolutions are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950). Significant weight is given to an ALJ's credibility determinations because the ALJ actually sees and hears the witnesses when they testify. It is for this reason that a witness's demeanor, including their expressions, physical posture and appearance, manner of speech, and non-verbal communication, may convince the ALJ that the witness is testifying truthfully or falsely. Credibility determinations may also be based on the weight of the respective evidence (established or admitted), inherent probabilities, and reasonable inferences, which may be drawn from the record as a whole. *Medeco Security Locks,* 322 NLRB 664 (1996); *Shen Automotive Dealership Group,* 321 NLRB 586, 589 (1996); *accord V&W Castings,* 231 NLRB 912, 913 (1977), enfd. 387 F.2d 1006 (9th Cir. 1978).

Here, the ALJ correctly discredited Manning's testimony. For one, the ALJ considered the inconsistencies in Manning's own testimony. For example, Manning suggested that he figured the meeting was to discuss work issues because he had similar meetings with Phipps in the past. However, Manning testified that Phipps was not the one who invited him to Denny's on this occasion. Tr. 973:3-11. Second, the ALJ relied on the inherent probability and other

reasonable inferences in finding that Manning was not invited to the meeting. For example, because Manning was clearly opposed to the Union, the ALJ found it unlikely that he was invited. ALJD 21 n.37. Further, because Manning admitted to hearing talk on the loading docks about meetings, the ALJ found it likely that Manning heard about this one. *Id.* This finding is further supported by the record as a whole as Wallace, who worked on the loading dock, attended this meeting. Tr. 651:4-652:25. Thus, the Board should adopt the ALJ's finding because there is no basis to overturn the ALJ's credibility determination.

2. Manager Remblance Engaged in Surveillance

Respondent takes exception to the ALJ's finding that Safety Manager Remblance engaged in surveillance when he approached and interrupted Phipps and another employee while they were on break. R Br. at 34-35. Respondent argues that the ALJ relied on an exaggerated characterization of events in finding this violation and cites to a case that the ALJ clearly distinguished in his decision. Specifically, Respondent relies on *Airport 2000 Concessions, LLC*, 346 NLRB 958, 958-59 (2006), for the proposition that surveillance of Union activities conducted openly on the employer's premises is not unlawful. R Br. at 35. However, the ALJ properly noted that unlike the instant matter, the case relied on by Respondent does not involve any "out-of-the-ordinary" type of conduct. ALJD 23 n.43. Further, the ALJ correctly pointed out several factors that indicated Remblance's conduct was out-of-the-ordinary or premised on discovering whether Phipps was engaged in Union activity. For example, the ALJ noted that "Remblance was not in Phipps' direct supervisory chain and had never monitored his break before" and that there was no other reason for Remblance to do so at this time "other than Phipps' recent announcement about the campaign in the breakroom." ALJD 23:10-16. Thus, the Board should adopt the ALJ's finding of unlawful surveillance based on Remblance's

unexplainable conduct. *See Basic Metal & Salvage Co., Inc.*, 322 NLRB 462, 464 (1996) (noting that "unusual activity" such as "standing very close to the union agent in order to interrupt" protected activity signals a violation).

3. Supervisor David Garcia Engaged in Surveillance by Looking for Union Cards

Respondent excepts to the ALJ's finding that Supervisor David Garcia (Garcia) engaged in unlawful surveillance by searching for Union cards amongst employee Mario Lerma's (Lerma) clipboard. In doing so, Respondent solely relies on Garcia's discredited testimony. As discussed earlier, the Board will not overrule an ALJ's credibility determinations unless the clear preponderance of the relevant evidence shows that the ALJ's credibility resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950). Rather than argue why the Board should disregard the ALJ's credibility resolution, Respondent merely points out contrary testimony from Garcia that was not even corroborated by other record evidence. R Br. at 36-37. Simply put, this is not enough for the Board to reconsider, much less overrule, the ALJ's finding that Garcia was an incredible witness or that he unlawfully engaged in surveillance by searching for Union cards. Accordingly, the Board should adopt the ALJ's findings.

IV. Respondent's Exceptions to Findings of Unlawful Discipline Should be Rejected

A. The Board Should Affirm the ALJ's Finding that Respondent Unlawfully Discharged Employee Thomas Wallace

The ALJ found that Respondent violated Section 8(a)(1) and (3) of the Act by discharging Wallace.[4] In excepting to this finding, Respondent argues that the ALJ erred in

[4] The ALJ found that Wallace was discharged for both engaging in protected concerted activity (complaining about the healthcare plan at a staff meeting) and because Respondent at least suspected that Wallace supported the Union campaign. ALJDALJD 39:25-30; Respondent's Brief in Support of its Exceptions does not address the ALJ's finding that Wallace was discharged in violation of Section 8(a)(1) of the Act for making a concerted complaint about his working conditions.

finding that Respondent knew of Wallace's union activity and that the ALJ's finding of pretext was just based on unsupported speculation. However, as discussed below, the ALJ's findings on both counts are overwhelmingly supported by the record.

1. Respondent Knew or at Least Suspected that Wallace Supported the Union

The ALJ found, based on circumstantial evidence, that Respondent knew or suspected that Wallace supported the Union campaign. ALJD 40:1-6. The ALJ relied on the nature of Wallace's questions during the January 28 and March 31 meetings in making this finding. *Id.* Respondent excepts to this finding on the basis that neither of Wallace's questions directly revealed his support for the Union. R Br. 39-40. Respondent further discounts the ALJ's reliance on Engdahl's admission that Wallace's question at the January 28 meeting "stuck" with him because it was "pretty insightful." R Br. 39. In doing do, Respondent argues that Wallace testified that he was unaware of the campaign when spoke up at the first meeting. R Br. 39. However, whether Wallace was actually asking his questions as a method to further the campaign or reveal his union support to others is irrelevant. What matters is whether his questions support a reasonable inference that Respondent's management suspected Wallace was leading or supporting the Union's efforts.

Here, the ALJ properly found that the nature of Wallace's questions led Respondent to believe that he supported the Union. First, Engdahl's admission should not be discounted because it shows that Wallace put a target on his back early on in the campaign. Engdahl, in clarifying what he meant when he said that Wallace's January 28 question was "insightful," stated that in the many years that he has been "educating" employees about unions at Town Hall and other types of meetings, he had never heard an employee ask a question like Wallace's. Tr. 897:21-898:1. Second, the nature of Wallace's question at the March 31 meeting, unlike other

employees' questions about healthcare, garnered a notable reaction from his coworkers. Tr. 310:17-311:15; 437:11-438:23; 656:11-19; 715:12-22; GC Ex. 11(a) at 30:7-31:6; GC Ex 11(b) at 50:47. Thus, contrary to Respondent's contention, although Wallace did not speak about the Union at this meeting, there was plenty of reason for Respondent to believe that he was raising an issue central to the union campaign at that time.[5]

The ALJ also relied on Vaivao's statements to employees that he "knew 'exactly' which 'disgruntled' employees supported the Union and attended union meetings." ALJD 40:4- . Respondent argues that the ALJ's reliance is misplaced because in context, Vaivao[6] only told employees that he knew which employees were soliciting union authorization cards. However, Respondent's characterization rejects the plain meaning of Vaivao's words. Simply, Vaivao stated that, "So I know who they are. I know there's meetings out there. I know there was a meeting a couple – a few weeks ago. And I know who attended." GC Ex. 10(a) at 11:4-8. Vaivao clearly stated that he knew which employees attended recent union meetings and the ALJ properly relied on his statements. Respondent's attempt to construct new meaning to Vaivao's admission must be rejected. Accordingly, the Board should adopt the ALJ's finding that Respondent knew or had reason to believe that Wallace supported the Union efforts.

[5] This is further supported by Engdahl's statements at a meeting a few weeks later. Shortly after telling employees that the Union would hurt everybody in the future, Engdahl said, "People are still upset over our insurance." Then, he told them they should be "less emotional" about it. GC Ex. 12(a) at 2:20-4:6. The context of Engdahl's comments shed light on how Respondent's upper management clearly connected Wallace's discord with the health care changes to the employees' support for the Union.

[6] Respondent also excepts to the ALJ's finding that Vaivao violation Section 8(a)(1) by telling employees during a meeting to "raise [their] hand and let management know the union supporters are bugging them." ALJD 10:22-35 (internal quotations omitted). The Board should reject Respondent's argument that "there is no manager on the dock that would see an employee raise his hand" because Vaivao never specified to employees when he made the statement as to when and where they should alert management of protected activity. R Br. 35.

2. Respondent's Reasons for Discharging Wallace Were Pretext

The ALJ found that in addition to animus found by Respondent's "numerous unfair labor practices and the record as a whole," there was "an abundance of other, circumstantial evidence that the discharge was unlawfully motivated." ALJD 40:6-13. Specifically, the ALJ found that Respondent's proffered reasons for terminating Wallace were pretext based on Respondent's (1) shifting reasons; (2) false reasons; and (3) a complete lack of investigation. *Id.* In turn, Respondent excepts to each of these findings. R Br. at 40-42. However, as discussed below, the ALJ properly found and relied on Respondent's shortfalls related to its decision to discharge Wallace.

First, the ALJ found that Respondent gave shifting reasons for Wallace's discharge. ALJD 40:18-41:4. The ALJ pointed out that the purported decision maker, Vince Daniels (Daniels), testified inconsistently about why he decided to fire Wallace. First he testified that it was because Wallace made a dismissive gesture and left the meeting early. *Id.* Then, he said it was solely for leaving the meeting early. *Id.* Putting these inconsistencies aside, the ALJ further noted that Daniels' testimony was different than the company's position statement that stated Wallace was discharged for "belligerently interrupting a senior Company official multiple times." *Id.* Respondent argues that the position statement was erroneously relied on because it was based on "witness recollections more than two months after the fact." R Br. at 41. However, if Daniels was the sole decision maker, his recollection would presumably be the only one relied on when submitting Respondent's position statement in regard to why Wallace was discharged. Thus, Respondent's reasons for discounting its own statement fails to reconcile Daniels' shifting reasons for discharging Wallace. Accordingly, the ALJ properly relied on this evidence in finding "shifting reasons support an inference of unlawful motive." ALJD 41:1-4

(citing *Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 6 (2014); *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999); *Black Entertainment Television*, 324 NLRB 1161 (1997); and *Zurn Industries*, 255 NLRB 632, 635 (1981), affd. 680 F.2d 683, 694 (9th Cir. 1982), cert. denied 462 U.S. 1131 (1983)).

Second, the ALJ found that Respondent gave false reasons for discharging Wallace to support an inference of unlawful motive. ALJD 41:6-20. The ALJ recognized that Wallace did not in fact interrupt Beake at the March 31 meeting, nor did he make a dismissive gesture before he left the meeting. ALJD 41:6-8, 38 n. 68. Further, the ALJ found that Respondent's contention that Wallace left the meeting early was, "at best a distortion or exaggeration of the facts." ALJD 41:8-10. These finding were based on the audio recording of the meeting and the ALJ's credibility resolutions related to relevant testimony. See ALJD 41:6-13; 38 n.68. Respondent only addresses these findings by relying on its defense that its position statement was drafted without the benefit of listening to the audio recording and that it was based on unreliable witness recollections. R Br. 40-41. Notably though, Respondent's "explanation" for providing false reasons for discharging Wallace completely fails to address anything except for the ALJ's finding that Wallace did not interrupt Beake. Moreover, its argument on this point falls short for the same reason discussed above. Respondent provides no reason for the Board not to adopt the ALJ's other findings, such that Wallace did not make a dismissive gesture or leave the meeting early. Thus, the Board should adopt the ALJ's finding that Respondent's "false or exaggerated reasons are likewise evidence of unlawful motive." ALJD 41:15 (citing *Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 6 (2014); *Key Food*, 336 NLRB 111, 114 (2001); *Yenkin-Majestic Paint Co.*, 321 NLRB 387, 396 (1996), enfd. mem. 124 F.3d 202 (6th Cir. 1997); *Radisson Muehleback Hotel*, 273 NLRB 1464, 1475–1476 (1985); *William L. Meyers*,

Inc., 266 NLRB 342, 346 (1983), enfd. mem. 735 F.2d 1371 (9th Cir. 1984); and *Ramada Inn*, 201 NLRB 431, 434-435 (1973)).

Third, the ALJ found that Respondent's failure to consult with Wallace or any of his supervisors before discharging him supported an inference of pretext. ALJD 42:6-21. Notwithstanding the ALJ's finding that Daniels' testimony related to his decision to discharge Wallace was wholly incredible, the ALJ found that, "even if Daniels did, in fact, make the decision in the confined and constricted manner he described, this in itself is strong evidence of unlawful motive." ALJD 41:27-42:7. The ALJ relied on several factors in making this finding, including the fact that Daniels did not "have any experience, knowledge, or responsibility regarding such disciplinary decisions at Shamrock" and the fact that Daniels failed to inquire why Wallace may have left early. ALJD 42:6-20. In defending Daniels' failure to consult with anyone about the decision, Respondent merely points out Daniels' testimony explaining his own inaction in that he did not think it was necessary to gather additional information or seek advice. R Br. at 42. However, Respondent's sole reliance these assertions completely ignores the ALJ's reasoning that Daniels' determination that it was not necessary to investigate further reflects complete indifference concerning whether Wallace in fact engaged in misconduct by leaving the meeting, or had legitimate reason for doing so, and also concerning whether discharging Wallace was consistent with Respondent's policies and its treatment of other employees. This indifference itself demonstrates that Respondent's reasons for terminating Wallace were not the true reasons for letting him go. Accordingly, the Board should reject Respondent's inadequate exceptions and adopt the ALJ's finding of pretext.

Finally, Respondent excepts to the ALJ's finding that Daniels' testimony related to Wallace's discharge was "inherently incredible." Respondent argues that this finding was based

on the ALJ's "selective (and erroneous) recounting of Daniels' testimony." R Br. at 41. In support of its argument, Respondent claims that the ALJ disregarded Daniels' testimony regarding why he was involved in Wallace's discharge, but not others. *Id.* However, the ALJ's finding should be adopted under *Standard Dry Wall Products,* 91 NLRB 544 (1950). The ALJ scrutinized Daniels' testimony regarding his role in the organization and found, based on inherent probabilities, that Daniels' involvement in Wallace's discharge was not as innocuous as Respondent would have the Board believe. Moreover, the ALJ found that Daniels' testimony on this issue contradicted Wallace's credited testimony. ALJD 41:27-42:4. Thus, the Board should not disturb the ALJ's credibility resolutions because the clear preponderance of the relevant evidence does not show otherwise.

B. The Board Should Affirm the ALJ's Finding that Respondent, by Engdahl, Unlawfully Disciplined Employee and Union Activist Mario Lerma

The ALJ found that Respondent disciplined employee Mario Lerma in violation of Section 8(a)(3) of the Act. ALJD 44:43-45:35. Respondent excepts to this finding, arguing that the ALJ incorrectly found that Engdahl's May 5 meeting with Lerma was disciplinary in nature. R Br. at 42-43. In doing so, Respondent relies on Engdahl and Vaivao's discredited testimony,[7] without giving any justification to the Board as to why the ALJ's credibility resolutions should be ignored. R Br. at 42-43. Indeed, there are no reasons to disturb the ALJ's credibility determinations, nor the ALJ's finding that this meeting was disciplinary. The ALJ relied on an audio recording and a certified transcript of the meeting in making his findings. GC Exh. 13(a), 13(b). The ALJ also relied on Respondent's own progressive discipline policy which begins at

[7] See ALJD 27 n. 49 ("I discredit the testimony of Engdahl (Tr.742-749) and Vaivao (Tr. 237-249) to the extent it conflicts with the recording and transcript of the meeting. For example, I discredit Vaivao's testimony that Engdahl specifically told Lerma that employees had complained that he had thrown pens at them when they declined to sign a union card.").

"counseling." ALJD 45:6-10; GC Exh. 3 at 64. Accordingly, the Board should adopt the ALJ's finding that Lerma was unlawfully disciplined because it well supported by the record.

V. Respondent's Exceptions to Findings of Unlawful Work Rules Should be Rejected

A. The Legal Standard

The Board has held that an employer's maintenance or promulgation of a work rule that "would reasonably tend to chill employees in the exercise of their Section 7 rights," violates Section 8(a)(1) of the Act. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). In particular, in *Lutheran Heritage*, 343 NLRB 646, 647 (2004), the Board enunciated a three-prong test for determining wither a rule not explicitly prohibit Section 7 activity is unlawful. The Board held that such a rule is unlawful if: "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Id.* In assessing whether employees would reasonably construe a rule to prohibit protected activities, the Board "give[s] the work rule a reasonable reading and refrain[s] from reading particular phrases in isolation." *Albertson's, Inc.*, 351 NLRB 254, 259 (2007). Any ambiguity in a rule is construed against the employer that promulgated it. *Flex Frac*, 358 NLRB at slip op. at 2; *Lafayette Park Hotel*, 326 NLRB at 828.

The Board has explained that "[t]his principle follows from the Act's goal of preventing employees from being chilled in the exercise of their Section 7 rights—whether or not that is the intent of the employer—instead of waiting until that chill is manifest, when the Board must undertake the difficult task of dispelling it." *Flex Frac*, 358 NLRB No. 127, slip op. at 2. Thus, the Board has held that employees "should not have to decide at their own peril" whether to engage in a protected activity that may be implicated by an ambiguously worded work rule. *Id.*;

cf. NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969) (assessment of whether employer statements violate Section 8(a)(1) "must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear").

B. The Board Should Affirm the ALJ's Findings that Rules Within Respondent's Associate Handbook are Unlawful

1. Respondent's Confidentiality Rule is Unlawful

Respondent argues that the ALJ erred in finding that its confidentiality/ non-disclosure rul in its Associate Handbook violates the Act because employees would reasonably construe it as prohibiting or restricting protected activity. R Br. at 6. In doing so, Respondent argues that the "ALJ's finding of a violation in regard to this rule was based on the reference to employee information." R Br. at 6 (citing ALJD 47). Respondent supports its argument with cases where the Board or other courts have found references to "employees," where the rule otherwise illustrates the meaning of "confidential information" along the lines of proprietary information, as lawful. However, contrary to Respondent's argument, the ALJ did not just rely on a single reference to "employee information" in making his finding. Rather, the ALJ recognized that the rule defines "confidential information" with examples such as "information, knowledge, or data concerning associates (i.e. employees), Company manuals and policies, and compensation schedules." ALJD 47:1-5 (internal quotations omitted). Because the rule references "compensation schedules" and "Company manuals and policies," the rule would reasonably be construed as restricting, if not prohibiting, employees from discussing their working conditions including their pay rates and the work rules that apply to them. Accordingly, the Board should adopt the ALJ's findings.

2. Respondent's Blogging Policy is Unlawful

Respondent excepts to the ALJ's finding that several paragraphs in its "Blogging" policy violate the Act. R Br. at 7-9. The ALJ found that paragraphs 1-3, 6-8, and 10 of the policy violate that Act because employees would reasonably construe them to prohibit or restrict protected activity. ALJD 53:5-54:30. In sum, Respondent argues that the context of the rules makes it clear that they do not encompass Section 7 activities and that the rules are tailored to its legitimate business interests in protecting private or confidential information, preventing workplace harassment, and preventing employees from conveying the impression that they are speaking on behalf of Respondent. R Br. at 7-9. Contrary to these contentions, Respondent's "Blogging" policy squarely violates Board law.

First, the rule begins by explicitly warning employees that it applies to their blogging on personal websites, during non-work time, or outside the workplace. The rule then goes on to state that Respondent "discourages associates from discussing publicly any work-related matters, whether confidential or not, outside company-authorized communications." This very broad restriction would certainly be understood by employees to encompass Section 7 protected communications about Respondent, such as criticisms of its labor policies and of the terms and conditions of employment it sets for its employees and also communications about a union organizing campaign among its employees. Thus, the rule interferes with employees' right to engage in Section 7 protected communications electronically. *See Triple Play Sports Bar and Grille*, 361 NLRB No. 31, slip op. at 1 (2014).

Next, the rule burdens employees with a "duty to protect associates' home addresses . . . and other personal information and . . . financial information . . . and nonpublic company information that associates can access." Although Respondent asserts that it has a legitimate

business interest in preventing the disclosure of such information, employees have the right to communicate with each other and with non-employees about their terms and conditions of employment. *Cintas Corp. v. NLRB*, 482 F.3d 463, 468-469 (D.C. Cir. 2007); *Fresh & Easy Neighborhood Market*, 361 NLRB No. 8, slip op. at 2-3 (2014); *Quicken Loans, Inc.*, 361 NLRB No. 94, slip op. at 1 n.1 (2014); *Flex Frac*, 358 NLRB No. 127, slip op. at 1-3; *Hyundai America Shipping Agency Inc.*, 357 NLRB No. 80, slip op. at 12, 13 (2011). That right encompasses the right to disclose coworkers' names and contact information to a labor organization in furtherance of an organizing effort or to other employees in aid of protected concerted activities. *See Ridgely Mfg. Co.*, 207 NLRB 193, 196-97 (1972) (employee right to obtain names of coworkers from timecards), *enfd.*, 510 F.2d 185 (D.C. Cir. 1975). Further, the terms "personal information," "financial information," and "non-public company information" are so broad and ambiguous that Respondent would reasonably understand the rule to restrict their ability to communicate about their terms and conditions of employment and about union organizing campaigns on blogs. See *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, slip op. at 2 (2015).

The rule next bars employees from "us[ing] blogs to harass, threaten, libel, or slander, malign, defame or disparage, or discriminate against co-workers, managers, customers, clients, vendors or suppliers, and organizations associated or doing business with Shamrock, or members of the public, including Web site visitors who post comments about blog contents." Although Respondent argues, citing *Adtranz ABB Daimler-Benz Transp. v.* NLRB, 253 F.3d 19, 25 (D.C. Cir. 2001), that this rule is tailored to its interest in preventing workplace harassment, this rule, unlike the rule at issue in *Adtranz*, goes beyond just prohibiting "abusive or threatening language" and incorporates many other broad and ambiguous terms, such as, "harass, …libel, or slander, malign, defame or disparage," that employees would understand to restrict their right to

engage in protected activities. See *The Sheraton Anchorage*, 362 NLRB No. 123, slip op. at 1 (2013); *Triple Play Sports Bar and Grille*, 361 NLRB No. 31 (2014); *First Transit, Inc.*, 360 NLRB No. 72, slip op. at 3 (2014); *2 Sisters Food Group, Inc.*, 357 NLRB No. 168, slip op. at 3 (2011); *Flamingo Hilton-Laughlin*, 330 NLRB 287, 295 (1999); *Advance Transp. Co.*, 310 NLRB 920, 925 (1993). Notably, the rule gives no indication that it is exclusively intended to address workplace harassment based on any legally protected classification.

The rule also prohibits use of Respondent's logo or trademarks or the name, logo, or trademarks of any business partner, supplier, vendor, affiliate, or subsidiary without approval. It further prohibits posting of "copyrighted information or company-issued documents bearing Shamrock's name, trademark, or logo" and discourages linking Respondent's website from personal blogs. Respondent, not citing any cases, perhaps in view of its recognition that Board law does not support its position, broadly argues that these portions of its rules are tailored to its interest in preventing employees from conveying the impression that they are posting on behalf of the Employer. However, the Board has found that employees have a Section 7 right to use their employer's name, trademark, or logo to identify their employer in Section 7 communications. See *UPMC*, 362 NLRB No. 191, slip op. at 2 n. 5 (2015); *Boch Honda*, 362 NLRB No. 83, slip op. at 2 (2015); *Pepsi Cola Bottling Co.*, 301 NLRB 1008, 1019-1020 (1991). The restriction on disclosure of company-issued documents bearing Respondent's name, trademark, or logo, would also reasonably be read by employees to restrict their ability to share Respondent's policies, such as its Associate Handbook, on their blogs, to the extent they have Respondent's name, trademark, or logo on them, and would restrict employees from exercising their Section 7 right to share their personnel records if those records have Respondent's name, trademark, or logo on them. *Hyundai America Shipping Agency, Inc.*, 357 NLRB No. 80, slip op.

at 21. Finally, the restriction on linking Respondent's website, like the restriction on using Respondent's logo or trademark, interferes with employees' ability to use links to Respondent's website to effectively identify Respondent in their Section 7 protected communications.

In sum, Respondent's blogging rule is overly broad, and the General Counsel respectfully requests that the Board uphold the ALJ's finding that Respondent's maintenance of the policyu is unlawful.

3. Respondent's Reporting Violation Policy is Unlawful

Respondent excepts to the ALJ's finding that a related "Reporting Violations," paragraph is unlawful as it requires employees to report violations of Respondent's overly broad "Blogging" policy (discussed above). R Br. 9-10. Respondent argues that (1) this rule cannot be unlawful because the ALJ erred in finding the "Blogging" policy unlawful, and (2) a reasonable reading of the rule indicates that employees are not required to report violations. The Board should reject Respondent's exceptions for the following reasons. *Id.*

First, contrary to Respondent's arguments, the "Blogging" policy is unlawful as it restricts protected activity. Second, although Respondent points out that the rules only "requests" and "urges" employees to report violations of the Blogging policy, employees would reasonably construe the terms as requiring them to do so. However, even if Respondent's reading is a reasonable one, it does not counter the ALJ's ruling that this rule "effectively solicits employees to report such protected activities to the Company." ALJD 55:37-38. Accordingly, the Board should adopt the ALJ's finding that this provision is unlawful.

4. Respondent's Guidelines to Appropriate Conduct Policy is Unlawful

Respondent excepts to the ALJ's finding that paragraph 6 within its "Guidelines to Appropriate Conduct" policy violates the Act. R Br. 10-11. The paragraph states that the following conduct will result in disciplinary action:

> Any act that interferes with another associate's right to be free from harassment or prevents an associate's enjoyment of work, including sexual or other harassment, wasting the associate's time, harming or placing the associate in harm's way, immoral or indecent conduct or conduct that creates a disturbance in the workplace.

The ALJ found that the policy goes well beyond lawful harassment policies, pointing out phrases in the policy such as "prevents an associate's enjoyment of work" and "conduct that creates a disturbance in the workplace." ALJD 56:37-40. The ALJ's position is well supported. In *W. F. Hall Co.*, 250 NLRB 803, 804 (1980), quoting *Colony Printing & Labeling, Inc.*, 249 NLRB 223, 225 (1980), enfd. 651 F.2d 502 (7th Cir.1981), the Board explained that "the Act allows employees to engage in persistent union solicitation even when it annoys or disturb s the employees who are being solicited." *See also Ryder Transportation Services*, 341 NLRB 761 (2004) (cited by the ALJ). Thus, as the ALJ properly found, Respondent's rule, which would reasonably be read to prohibit such spirited and persistent protected activities, interferes with employees' Section 7 rights. Respectfully, the Board should adopt the ALJ's finding.

5. Respondent's Solicitation and Distribution Policy is Unlawful

The ALJ found that Respondent's "No Solicitation or Distribution" policy violated the Act because it "explicitly ban[s] soliciting or distributing in customer or public areas at any time. ALJD 57:39-40. The ALJ reasoned that employees would reasonably construe the rule as prohibiting "off-duty employees from engaging in union solicitation or distribution . . . in parking lots and other public nonworking areas between shifts." ALJD 57:40-43. Respondent

argues that the ALJ erred because there was no showing that there are "customer or public" areas at the Phoenix facility. R Br. at 12. However, there is no question that the facility has a parking lot. Tr. 651:4-9. Further, it can be presumed from the fact that the rule refers to "customer or public areas" that Respondent has such areas at facilities where its Associate Handbook is in effect. Thus, the ALJ's reasoning and finding should be adopted by the Board.

C. The Board Should Affirm the ALJ's Findings that Respondent's Severance Agreement Violates the Act

The ALJ found that several provisions in the Separation Agreement presented to Wallace at the time of his termination were overbroad and unlawful under the first prong of the test in *Lutheran Heritage*, 343 NLRB at 647. Specifically, the ALJ found that paragraphs 10, 12, and 13 unlawfully prohibited disclosure of information regarding warehouse working conditions and prohibited employees from making disparaging remarks about the company. Respondent excepts to the ALJ's findings by arguing that (1) a reasonable employee would not view herself as bound by an unsigned agreement and (2) the provisions are nonetheless lawful. The Board should reject these exceptions for the reasons discussed below.

1. Just as the ALJ Found, It Makes No Difference That the Agreement Went Unexecuted

Respondent argues that the ALJ's findings regarding each provision were erroneous because a reasonable employee would not view herself as bound by the unsigned agreement. In doing so, Respondent contends that the ALJ's reliance on *Metro Networks*, 336 NLRB 63 (2001) was misplaced because that case involved an 8(a)(4) violation rather than a Section 8(a)(1) violation. However, the ALJ's reliance on the Board's reasoning in *Metro Networks* is sound. *Metro Networks* involved provisions in an unexecuted agreement that prohibited the disclosure of information related to employees' working conditions. 336 NLRB at 67. ("paragraph 8 would

prohibit him from communicating with anyone about his employment with the Respondent"). Here, the provisions at issue similarly attempt to prohibit employees from disclosing information about their working conditions. The fact that the agreement went unsigned only means that Respondent would be unable to enforce the terms of the agreement and has no effect on whether it promulgated these rules.

2. The ALJ Properly Found That Paragraphs 10, 12, and 13 Are Overly Broad and Unlawful

Respondent excepts to the ALJ's findings that paragraphs 10 and 12 are overly broad prohibitions on disclosing "confidential information" that includes information on employees' working conditions. In doing so, Respondent refers to its exceptions related to its similarly unlawful handbook rules. R Br. at 14. As discussed above in Section V.B.2, employees have the right to communicate with each other and with non-employees about their terms and conditions of employment, and confidentiality provisions barring the disclosure of information about employees, including their terms and conditions of employment are unlawful. *Cintas Corp. v. NLRB*, 482 F.3d at 468-469; *Fresh & Easy Neighborhood Market*, 361 NLRB No. 8, slip op. at 2-3; *Flex Frac*, 358 NLRB No. 127, slip op. at 1-3; *Hyundai America Shipping Agency Inc.*, 357 NLRB No. 80, slip op. at 12, 13. Thus, ALJ's findings are well supported by Board precedent and should be adopted. ALJD 43:28-41.

Respondent further excepts to the ALJ's finding that paragraph 13, a broad prohibition on making disparaging comments about the company, is unlawful. Respondent argues that the finding "ignores the fact that Wallace was no longer an employee at the time that the severance agreement was presented to him." R Br. at 14. Respondent provides no support for its position that this should matter, likely because it is contrary to well-established Board law. In fact, "the Board has long held that [the] term [employee] means 'members of the working class generally,'

including 'former employees of a particular employer.'" *Little Rock Crate & Basket Co.*, 227 NLRB 1406, 1406 (1977) (quoting *Briggs Manufacturing Company*, 75 NLRB 569, 570-71 (1947)). *See also Cellular Sales of Missouri, LLC*, 362 NLRB No. 27, slip op. at 1 n.3 (2015). Respondent also argues that paragraph 13 makes no reference to Section 7 activity and should not be found unlawful because it "*could* be interpreted to restrict protected conduct." However, the Board has found provisions similar to paragraph 13 to be overly broad because employees *would* reasonably understand them to encompass Section 7 activities. See *Lily Transportation Corp*., 362 NLRB No. 54), slip op. at 1 and JD at 8 (2015); *Quicken Loans, Inc.*, 361 NLRB No. 94, slip op. at 1 n.1 (2014). Thus, the ALJ's finding on the merits is well supported by Board precedent and should be adopted. ALJD 43:43-44:13.

D. The Board Should Affirm the ALJ's Finding That Engdahl Promulgated an Unlawful "No Heckling" Rule

Respondent excepts to the ALJ's finding that it promulgated an unlawful rule on May 5 during Lerma's disciplinary meeting. R Br. at 15. Respondent argues that the ALJ erred in ignoring the issue of a slowdown, "Engdahl's primary concern in the meeting." R Br. at 15. However, the ALJ properly ignored the slowdown issue. The rule at issue is Engdahl's directive that "heckling" or "insulting" would not be tolerated. While Engdahl may have mentioned (in rather vague terms) a potential slowdown, Engdahl and Vaivao made clear that they were actually concerned about what Lerma was saying to other employees in the warehouse. For example, Vaivao told Lerma that he was concerned because employees were telling Respondent that Lerma was "the local voice out there . . . telling [his] opinion in front . . . of the guys." ALJD 26:35-38; GC Exh. 13(a), 13(b). At another point, Engdahl told Lerma that it was okay to express his opinions as long as others did not feel "threatened or intimidated." ALJD 26:25-30; GC Exh. 13(a), 13(b). At yet another point, Vaivao discussed how other employees were

concerns about what Lerma was saying about the company's new pay plan. ALJD 26:33-36; GC Exh. 13(a), 13(b). These comments support a finding that Engdahl's directive went far beyond what Respondent characterizes as Engdahl's primary concern. For this reason, the ALJ properly ignored the slowdown issue in finding a violation under the first and second prongs of *Lutheran Heritage*, 343 NLRB at 647, in that Engdahl's statements were transparently promulgated in response to union activity and, on their face, they would reasonably be understood to encompass Section 7 activities.

E. The Board Should Affirm the ALJ's Finding that President and CEO Kent McClelland's Letter Violated the Act

The ALJ found that President and CEO Kent McClelland's letter, dated May 8, promulgated an overbroad rule prohibiting "unlawful coercive behavior or bullying." The ALJ found this rule unlawful under the first and second prongs of *Lutheran Heritage*, 343 NLRB at 647. In excepting to the ALJ's finding, Respondent argues that McClelland sent the letter in response to reports that employees were threatened at work and that the language in the letter is consistent with both the General Counsel Memorandum 15-04, "Report of the General Counsel Concerning Work Rules," March 18, 2015, at *11-12, and *Lutheran Heritage*, 343 NLRB at 647, 253 F.3d at 27-28. However, just as the ALJ found, Respondent's defense is not supported by the record.

First, Respondent's contention that McClelland sent the letter because he was concerned about harassment in the warehouse, although he had no idea what the reported behavior related to, was discredited by the ALJ. In fact, McClelland's testimony was so incredulous, the ALJ actually found the opposite to be true. ALJD 30 n.54. Respondent has given no reason to overturn the ALJ's credibility resolution on this point. Moreover, as the ALJ considered, the record is devoid of any evidence of violence or actual harassment. Rather, the record is replete

with evidence that employees were merely complaining about being approached by union supporters. In fact, Vaivao continually told employees during his union prevention meetings that employees felt harassed because they were fed up with being approached to sign union cards or that employees were coming to him with concerns about how the Union would affect their financial affairs. ALJD 11:9-12:8; GC Exh. 10(b), 10(b). Accordingly, the Board should adopt the ALJ's finding that McClelland's rule, promulgated in his May 8 letter, was sent in response to union activity, a clear violation under the second in Lutheran Heritage.

Finally, the Respondent also argues that the rule is not overbroad, but rather consistent with D.C. Circuit Court's ruling in *Adtranz*, 253 F.3d at 25. In that case, the Court did not enforce the Board's ruling that a handbook rule prohibiting the use of "abusive or threatening language to anyone on company premises" would "reasonably be interpreted as barring lawful union organizing propaganda." 253 F.3d at 25 (internal quotations omitted) (quoting *Adtranz ABB*, 331 NLRB 291, 293 (2000)). However, the rule at hand prohibits far broader language – "unlawfully coercive behavior" and "unlawful bullying." Not even a dictionary could unpack what "unlawfully coercive behavior" is, much less the employees who received the letter. Just by simply couching each phrase in terms of "unlawfully" does not help clarify the meaning either. A reasonable employee, especially in an atmosphere of a contentious labor organizing effort, would undoubtedly construe McClelland's letter as prohibiting or restricting their ability to engage in union activity. Thus, the Board should adopt the ALJ's finding that the McClelland rule also violates the Act under the first prong of *Lutheran Heritage*, 343 NLRB at 647.

VI. The ALJ's Proposed Relief is Appropriate and Necessary to Effectuate the Policies of the Act

A. Respondent's Exceptions to the Portion of the Recommended Order Awarding a Make Whole Remedy and Reinstatement to Thomas Wallace Should Be Summarily Rejected

In its exceptions Respondent objects to the portions of the ALD's recommended Order awarding a make whole remedy and reinstatement to Wallace on the grounds that Wallace has accepted a lump sum payment exceeding his loss of earnings and other benefits and has voluntarily waived reinstatement. R Exc. 163, 164. Respondent fails to cite any record evidence or authority in support of those exceptions, and, for that reason alone, the exceptions should be summarily rejected.

Section 102.46(b)(1) of the Board's Rules and Regulations [29 C.F.R. § 102.46(b)(1)] provides, in relevant part, that, when a party files exceptions to a Judge's decision, "[e]ach exception…shall designate by precise citation of page the portions of the record relied on," and that "argument or citation of authority in support of the exceptions," shall be set forth in any supporting brief, or, if no such brief is filed, in the exceptions themselves. Section 102.46(b)(2) of the Board's Rules and Regulations [29 C.F.R. § 102.46(b)(2)] provides, in relevant part, that, "[a]ny exception which fails to comply with the foregoing requirements may be disregarded."

When a party completely fails to comply with these requirements, as Respondent has here, it is appropriate for the Board to disregard the party's bare, unbriefed exceptions. *See Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 n.1 (2005), *enfd.*, 456 F.3d 265 (1st Cir. 2006); *James Troutman & Assoc.*, 299 NLRB 120, 120-21 (1990) ("However, after carefully reviewing each of the Respondents' exceptions, the Board finds that they are so deficient as to warrant striking. Most of the exceptions cite no legal

authority and no transcript pages or any other record evidence that purportedly would support the contention that the judge erred. Further, the exceptions fail to allege with particularity on what grounds the judge's purportedly erroneous findings should be overturned"), *aff'd mem.*, 935 F.2d 275 (9th Cir. 1991).

Moreover, there is no record evidence establishing that, as Respondent contends, Wallace has accepted a lump sum payment exceeding his loss of earnings and other benefits and has voluntarily waived reinstatement. A determination that Wallace is not entitled to a make whole remedy and reinstatement would, thus, deprive the General Counsel and the Charging Party due process, in that they would be afforded no opportunity to Respondent's evidence in support of its bald assertions, object to the introduction of such evidence, or question or cross-examine witnesses concerning such evidence.

Accordingly, any dispute concerning Wallace's entitlement to a make whole remedy and reinstatement is appropriately deferred to the compliance stage, where all parties can be afforded due process, and the facts surrounding the dispute, including any facts relevant to whether any agreement signed by Wallace complies with the standards of *Independent Stave Co.*, 287 NLRB 740 (1987), and whether, based on its terms and the circumstances surrounding its execution, it eliminates Respondent's responsibility for the make whole and reinstatement remedy.[8]

[8]In *Independent Stave Co.*, the Board held that in assessing whether to accept a private settlement, it is required to enforce public interests, not private rights, and must reject private settlements that are repugnant to the Act or Board policy. *Id.* at 741. The Board considers the following factors in making such an assessment: (1) whether the settlement is reasonable in light of the alleged violation, the risks of litigating the issue, and the stage of litigation; (2) whether the charging party, the respondent, and the discriminatees have agreed to be bound, and the General Counsel's position regarding the settlement; (3) whether fraud, coercion, or duress were present; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes. Certainly, Respondent's bare assertions in its exceptions are insufficient to permit an informed consideration of each of these factors.

B. A Reading of the Notice to Employees Is Necessary to Counter the Widespread and Extremely Coercive Effects of Respondent's Unfair Labor Practices

The ALJ recommended that, "[g]iven the severity and scope of the Company's unfair labor practices, and the fact that many of them were committed by high-level officials and/or at large and small mandatory meetings," the notice ought to be read aloud to employees. ALJD 62:35-63:2. The ALJ further recommended that President and CEO McClelland or Operations VP Engdahl should be required to read the notice since they were involved in and/or committed several unfair labor practices. Alternatively, the ALJ recommended that upon Respondent's request, a Board agent should read the notice in those individuals' presence. ALJD 62:35-63:2.

Respondent excepts to the ALJ's recommendation, characterizing it as "humiliating" and an "*ad hominem* attack." R Br. at 44. As such, Respondent argues that a notice reading will not effectuate the Act's policies, as the Board's authority is strictly "remedial." *Id.* However, in some cases, special remedies and actions are required to effectuate or preserve the Board's remedial power. For example, the Act includes Section 10(j) in order to preserve the Board's remedial power in instances where an employer's conduct and the deleterious effects on its employees risk going unchecked and effectively un-remedied by the Board. In fact, this is one such case. Unpublished Order, *Overstreet v. Shamrock Foods Co*., 2:15-CV-01785-PHX-DJH (Feb. 1, 2016).

Just as the Act provides for special action to preserve the Board's remedial power, the Board has recognized that special remedies are often required in order to "enable employees to exercise their Section 7 rights free of coercion." *Evenflow Transportation, Inc.*, 361 NLRB No. 160, slip op. at 1 (2014) (internal quotations omitted) (quoting *Carey Salt Co.*, 360 NLRB No. 38, slip op. at 2 (2014)). In particular, the Board finds that public notice readings are necessary

to effectuate the policies of the Act when the respondent's unlawful conduct is "sufficiently serious and widespread" that employees need reassurance that their rights "will be respected in the future." *Evenflow Transportation, Inc.*, 361 NLRB slip op. at 1 (citing *Whitesell Corp.*, 357 NLRB No. 97, slip op. at 6(2011). In some such circumstances, a notice reading "is warranted in order to dissipate as much as possible any lingering effects of the Respondent's unfair labor practices." *Evenflow Transportation, Inc.*, 361 NLRB slip op. at 1 (quoting *Homer D. Bronson Co.*, 349 NLRB 512, 515 (2007), enfd. mem. 273 Fed. Appx. 32 (2d Cir. 2008)).

Here, the ALJ's findings show that Respondent engaged in a destructive, coercive, and unlawful campaign aimed at its employees' protected union activity. Respondent fired a vocal union sympathizer, interrogated employees, threatened them, granted them unprecedented benefits, monitored their union meetings, confiscated their union flyers, searched their belongings for union cards, disciplined a lead activist for voicing his opinion, and solicited their grievances for months on end. And, when it all came to a head, the President and CEO of this $3 billion dollar company[9] sent the workers a personalized letter, threatening them with legal prosecution for their protected activity. Needless to say, these employees need reassurance that this will not happen again; that Respondent will respect their rights going forward. Accordingly, the Board should adopt the ALJ's remedial recommendation and order Respondent's President and CEO to publicly read the Board Notice to Employees at a mandatory meeting.

VII. Conclusion

For the foregoing reasons, CGC respectfully urges the Board to reject Respondent's exceptions and issue Respondent to promptly and fully remedy its egregious unfair labor practices.

[9] See R Br. at n.17.

Dated at Phoenix, Arizona, April 7, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of **GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION** in Case 28-CA-150157 was served by E-Filing and E-mail on this 7th day of April, 2016, on the following:

Via E-Filing:

The Honorable Gary Shinners
Executive Secretary
National Labor Relations Board
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Washington, D.C. 20570-0001

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